



Indirect tax update

Edition 35/2020 – 24 October 2020

Summary

Welcome to this week's Indirect Tax Update.

The First-tier Tax Tribunal has released an interesting decision this week in the case of Mid Ulster District Council. The case concerned whether the provision of sports services for the benefit of the local population was an 'economic' activity from a VAT perspective. The Council argued that, following the Court of Appeal judgment in Wakefield College, the provision should not be regarded as an economic activity and should, thus, be treated as outside the scope of VAT.

Alternatively the Council argued that if it was an economic activity, nevertheless, its provision of sports services was done so under a 'special legal regime' which did not distort competition between it and 'private' providers of the same or similar services.

HMRC argued that the services were an economic activity. Users were free to choose the activity to be undertaken and in the majority of cases paid a fee (albeit subsidised).

The Tribunal has allowed the Council's appeal. Whilst the services were provided in return for fees (and was, therefore, an economic activity for VAT purposes), the Council operated under a special legal regime.

The Government has issued a paper this week setting out the responses it received to a public consultation on the establishment of freeports within the United Kingdom. The document sets out the Government's UK Freeports vision and reaffirms its commitment to establishing Freeports across the whole of the UK.

Finally this week, HMRC has published commentary in relation to the issue of Revenue & Customs Brief 12/2020 on the subject of VAT and early termination payments. It seems that HMRC considers that it should have consulted more widely before issuing the change of policy brief. It also seems that until the guidance is updated further, HMRC Officers should take no 'proactive' action based on the Brief.

First-tier Tax Tribunal (FTT) – Mid Ulster District Council

Whether sports services provided by Council is an economic activity and provided under a 'special legal regime'?

Under existing VAT law, in general terms, the provision of goods and services in return for payment (consideration) is regarded as an 'economic activity'. Under UK VAT law, this is termed 'business activity' but it amounts to the same thing. There are a number of exceptions to that general principle that have been established through developments in case law. In this case, the Council argued that its provision of sports services (via local leisure centres etc) did not amount to an economic activity and, as such, should be treated as outside the scope of VAT.

The Council accepted that it provided the services in return for consideration (the fees paid by the participants) but that, on its own, did not make the activity an economic activity. For it to be regarded as such, it was necessary for the activity to also be carried on for 'remuneration'. The FTT did not accept that line of argument. The FTT concluded that the provision of sports services by the Council was an economic activity – the services were provided for both consideration and remuneration.

As an alternative argument, the Council submitted that, if the activity was an economic activity, it nevertheless operated that activity under a special legal regime and, as such, the services should not be treated as within the scope of VAT. Current VAT law stipulates that where public bodies provide goods or services in return for fees, contributions or payments, they should not be regarded as taxable persons unless such treatment could lead to distortion of competition between the Council and 'private' providers of the same or similar services. The Council argued that it did operate under a special legal regime (the Northern Ireland Act 1998 and the Recreation and Youth Order 1986). Unlike private operators of leisure services, the Council was bound by these legal obligations to provide the services in question. In particular, the obligation to provide "adequate" facilities meant that the Council had to take into account affordability, provision across the whole region, and the need to promote equality of opportunity across the community. A private law operator would not be so restricted or constrained and, as such, there could be no significant distortion of competition between the two providers.

The FTT agreed with the Council on this point. The Council was acting in accordance with its legal obligations imposed by statute and regulation. A private provider of the same or similar services would not be constrained in the same way. In other words, the Council was acting under different legal conditions to private operators even though the users of the services would not be aware of these differences. The FTT found that, in light of these legal obligations, there was no real prospect of meaningful competition between the private and public sector. Accordingly, there was no real risk of any significant distortion of competition either. The law requires the Council to provide 'adequate' facilities and, in the circumstances, the FTT considered that there was no real possibility of any private provider meeting that requirement. – The Council's appeal was allowed.

Comment – An interesting decision and one which HMRC is likely to appeal. In this case the Tribunal found that the activity of providing sports facilities was an economic activity for VAT purposes but, in light that the appellant Council was obliged by statute to provide the facilities, the Council was not to be regarded as a taxable person even though the activity was 'economic'. The FTT concluded on the evidence that it was highly unlikely that a private operator would enter the market given the legal requirement to provide 'adequate' facilities for the whole community. As such, it concluded that, in the circumstances, there was no distortion of competition. This case will be of great interest to most public authorities providing the same or similar services. HMRC has 56 days from the date of the decision (17 October) to lodge an appeal to the Upper Tribunal.

Government response to consultation of Freeports

HM Government publishes Command Paper 302

The Government published a consultation document in February 2020 in connection with a proposal to create Freeports in the United Kingdom. The Government has now published a summary of the responses it received.

In the foreword to the document, Chancellor Rishi Sunak states “In seizing the opportunities of leaving the European Union, we want the new Global Britain to be a hub for international trade and investment, partnering with our friends around the world as an independent trading nation. Revitalising our port regions through an ambitious Freeport policy is a key component of realising this vision and unlocking the deep potential of all nations and regions of the UK”.

The Government received over 350 responses to the 68 questions it posed in its consultation document. The Freeports consultation proposed a brand-new, bespoke Freeport model, with a comprehensive package of measures designed to boost trade, employment and innovation. Overall, respondents welcomed the ambition of the proposals, the emphasis on local economic geography and regeneration, the flexibility of the customs model, and the focus on innovation. Ports and businesses shared how Freeports could contribute to their sector’s success and future growth potential, while many local authorities and public-sector bodies were optimistic about the potential of Freeports to help transform local economies.

However, some respondents, including several non-government organisations and individuals, expressed views about potential negative impacts on areas including port security, safety, workers’ rights and the environment. Some respondents also expressed views around economic displacement – particularly in deprived areas – and the risk of Freeports being used for tax evasion or money laundering.

The Command Paper can be accessed from [this link](#)

Revenue & Customs Brief 12/20

HMRC apologises for the lack of consultation

Readers will be aware that HMRC recently changed its policy in relation to the VAT liability of termination and similar payments. The headlines have not been made as a result of the change – HMRC is entitled to change its views as a result of developments in case law or as a result of new legislation. The headlines in relation to this Brief were as a result of HMRC’s intention to apply the policy change retrospectively. We commented in our ITU 32/2020 that this retrospection was unconscionable given that business had relied on the published HMRC policy for many years.

HMRC has now issued a paper to the Joint Vat Consultative Committee which accepts that it should have consulted more widely before Revenue & Customs Brief 12/2020 was published. HMRC also confirm that “We are reviewing whether taxpayers might have a legitimate expectation to treat early termination and other similar payments as outside the scope of VAT prior to the publication of the RCB. This includes looking at the withdrawn guidance, other relevant guidance, VAT notices, plus agreements with trade bodies. Those we have identified are listed below. We will also look again at the case law on legitimate expectation and our obligation to collect tax due, including any cases members bring to our attention”.

HMRC also confirmed that it will revise the new guidance to make explicit that payments will only be taxable where the supply contracted for is taxable. (R&C Brief 12/20 stated that all termination payments would be liable to VAT).

In the meantime, HMRC has confirmed that until updated guidance is published, it has asked HMRC operational colleagues to take no proactive action based on R&C Brief 12/20.

Comment

In the Freeports consultation document, the government explained how Freeports around the world operate as secure customs zones, usually located at ports, where business can be carried out inside a country’s land border, but where different customs rules apply.

According to the Government, “Secure Freeport customs sites will enable UK businesses to access a range of benefits to boost their international competitiveness in a high productivity cluster”.

In addition, the Chancellor confirmed that the Government reaffirms its commitment to establishing Freeports across the whole of the UK.

The UK is ‘behind the curve’ in establishing Freeports. This move will be welcomed by businesses involved in the international trade in goods.

Comment

It is a shame that no-one, it seems, thought to consult on the policy changes announced by R&C Brief 12/2020.

Following discussions with many taxpayers and their advisors and other interested stakeholders it seems that HMRC has now accepted and apologised for that oversight.

Grant Thornton UK LLP contributed observations to HMRC in relation to this R&C Brief and called for it to be withdrawn.

Businesses affected by these changes will welcome the news that local HMRC Officers should not take any action in relation to retrospection until the policy has been reviewed. Any business that has received an assessment for VAT on termination and similar payments should seek a reconsideration in light of these latest developments.

Contacts

Karen Robb

T +44 (0)20 7728 2556
E karen.robbs@uk.gt.com

Nick Warner

T +44 (0)20 7728 3085
E nick.warner@uk.gt.com

Alex Baulf

T +44 (0)20 7728 2863
E alex.baulf@uk.gt.com

Daniel Sherwood

T +44 (0)1223 225616
E daniel.sherwood@uk.gt.com

Nick Garside

T +44 (0)20 7865 2331
E nick.garside@uk.gt.com

Paul Wilson

T +44 (0)161 953 6462
E paul.m.wilson@uk.gt.com

Claire Hamlin

T +44 (0)161 953 6397
E claire.a.hamlin@uk.gt.com

Morgan Montgomery

T +44 (0)121 232 5126
E morgan.montgomery@uk.gt.com

© 2020 Grant Thornton UK LLP. All rights reserved.

Grant Thornton’ refers to the brand under which the Grant Thornton member firms provide assurance, tax and advisory services to their clients and/or refers to one or more member firms, as the context requires. Grant Thornton UK LLP is a member firm of Grant Thornton International Ltd (GTIL).GTIL and the member firms are not a worldwide partnership. GTIL and its member firms are not agents of, and do not obligate, one another and are not liable for one another’s acts or omissions. This publication has been prepared only as a guide. No responsibility can be accepted by us for loss occasioned to any person acting or refraining from acting as a result of any material in this publication.